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IN THE

Supreme Court of the United States

October Term, 1954.

No. 196.

F. E. HARRISON,
Petitioner,

v.

PARAMOUNT PICTURES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, F. E. HARRISON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 6, 1954, in the case of *F. E. Harrison, Appellant v. Paramount Pictures, Inc., et al.*, Docket No. 11,-194, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Third Circuit be reversed by this Honorable Court and such other relief granted as this Court may deem proper.

OPINIONS BELOW.

The Opinion of the District Court [R. 326-334] is reported in 115 F. Supp. 312, and the Opinion of the Court of Appeals for the Third Circuit [R. 680-81] is reported in F. 2d . This case is brought under Section 5 of the Clayton Act upon *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1947), *affirmed in part and reversed in part*, 334 U. S. 131 (1948); 85 F. Supp. 881 (1949) *cert. denied* 339 U. S. 974 (1951).

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment in question under Section 1254(1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit of April 6, 1954.

QUESTIONS PRESENTED.

1. Whether in a private motion picture antitrust suit invoking the benefits of Section 5 of the Clayton Act with respect to the *Paramount* decree, in which petitioner related the *Paramount* conspiracy temporally and spatially to the local scene, the courts below erred in interpreting Section 5 as authorizing:

(a) a refusal to reconstruct for the jury the substance, nature, extent, and scope of the *Paramount* conspiracy and the means used by respondents to effectuate it [R. 270-71];

(b) the rejection of the *Paramount* decree as evidence for the jury [R. 297];

(c) the rejection of the *Paramount* decree as prima facie evidence of the unlawful motive of respondents in utilizing a system of runs and clearances and master agreements to effectuate the *Paramount* conspiracy on the local scene [R. 222-23, 329];

(d) an instruction which left to the jury the determination of the legality under the antitrust laws of the use of master agreements, a device which this Court in *Paramount* has held to be illegal *per se* [P. 279];

(e) the denial of a motion for a directed verdict based upon the unrebutted prima facie case made out under Section 5 by the introduction of the *Paramount* decree and the showing of the impact of the *Paramount* conspiracy upon petitioner's theatre [R. 220-223, 223; 309-311, 329].

2. Whether the courts below erred in holding as a matter of law that the landlord-owner of a theatre, admittedly injured as a result of the *Paramount* conspiracy, nevertheless, has no standing as a private suitor, and his property rights fall outside the protection of the antitrust laws [R. 224; 330-334].

3. Whether the courts below erred in holding that devices determined by this Court in *Paramount* to be illegal *per se*—clearances imposed by respondents conspiratorially as part of an illegal system and resulting in exclusion of petitioner's theatre from the early run market—could be reasonable restraints of trade.

STATUTES INVOLVED.

Clayton Act.

Section 4 (38 Stat. 731, 15 U. S. C. 15) (*Treble damage Suits*)

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 5 (38 Stat. 731, 15 U. S. C. 16) (*Judgments in Favor of Government Prima Facie Evidence*)

That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further,* This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Sherman Act.

Section 1 (26 Stat. 209, 15 U. S. C. 1) (*Contract, Combination or Conspiracy in Restraint of Interstate Commerce Illegal*)

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Section 2 (26 Stat. 209, 15 U. S. C. 2) (*To Monopolize, Attempt to Monopolize, Combine or Conspire*)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

STATEMENT OF THE CASE.

This case raises the question of the meaning of Section 5 of the Clayton Act as applied to a private antitrust suit wherein the *Paramount* conspiracy was related spatially and temporally to the local scene. It raises the question of the meaning of Section 5 as applied to an antecedent Government equity decree, supported by elaborate findings of fact and conclusions of law. An authoritative interpretation of Section 5, is sought, companion to this Court's interpretation in *Emich Motors Corp. v. General Motors*

Corp. (340 U. S. 558) of Section 5 as applied to an antecedent Government criminal conviction. Questions specifically posed by this Court in the *Emich* case, but not answered therein are among those raised here. There hangs, we feel, in the balance the preservation of the private suit as an ancillary force in the administration of the antitrust laws.

Petitioner brought this action for treble damages against the *Paramount* defendants [1], invoking the benefits of Section 5 in connection with the *Paramount* decree. The substance of the instant suit is that petitioner was injured by the suppression of competition between petitioner's theatre and the Warner theatre in the local area in the suburbs of Philadelphia, Pennsylvania [2]; that respondents refused to license petitioner's theatre on the first run in the area and that this refusal was pursuant to the very conspiracy in violation of the Sherman Act of which respondents were convicted in the *Paramount* case. During the period of the *Paramount* conspiracy and until it was en-

1. Respondents are: Paramount Pictures, Inc,; Paramount Film Distributing Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Warner Bros. Pictures Distributing Corporation; Stanley Company of America; RKO Radio Pictures, Inc.; Loew's Inc.; Twentieth Century Fox Film Corporation; Columbia Pictures Corporation; Universal Film Exchanges, Inc., and United Artists Corporation. The suit was dismissed as to Paramount Pictures, Inc. [R. 6] and Warner Bros. Pictures, Inc. [R. 5], which could not be served in the District.

2. Petitioner's theatre (called the "Seville Theatre" from 1926-46 and the "Bryn Mawr" Theatre thereafter) is located on the so-called "Main Line" area of suburban Philadelphia. Philadelphia is the Exchange District [R. 399] for a territory located in Pennsylvania, New Jersey and Delaware. In this territory the Philadelphia central city theatres (all Warner) played on first run in the territory with clearance over all other theatres. The second run in the territory was the so-called "key" or first neighborhood run in Philadelphia (mostly Warner). The Warner affiliated theatre on the Main Line (called the "Ardmore Theatre") played on the second neighborhood run with clearance over petitioner's theatre. Petitioner's theatre was compelled to play on a run after the Ardmore Theatre.

joined in 1948, despite requests and despite the admitted suitability of petitioner's theatre for earlier run exhibition [R. 101, 121] virtually all [3] of the *Paramount* defendants gave all of their product for the prior run exhibition in the area to the competitive Warner theatre, leaving the lessee [4] of petitioner's theatre during a period of many years without motion picture film on first run in the area for exhibition at petitioner's theatre.

The facts primarily relied upon here for recovery, occurred between 1930, the time of the acquisition by Warner of its monopoly of theatres in the Philadelphia area, and 1948 when the injunction of the Statutory Court against the *Paramount* conspiracy became effective.

Suit was instituted in 1951 by complaint filed in the United States District Court for the Eastern District of Pennsylvania [R. 7-15]. The case was tried during a two-week period in 1952 before Judge William H. Kirkpatrick and a jury, under the stipulation as to the existence of injury to petitioner and a severance of the issue of damages from the issue of liability, the trial of the latter being deferred [R. 224]. The jury returned a verdict in favor of all respondents [R. 298-308].

The trial court having denied [R. 223] petitioner's motion for a directed verdict [R. 220-223], filed an opinion in which it also denied petitioner's motion for judgment n. o. v. or in the alternative for a new trial [R. 326-334].

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3. Only Fox made its product available to petitioner's theatre for early run exhibition for a few years, with no expressed dissatisfaction with the grossing abilities of petitioner's theatre.

4. Petitioner's theatre was leased from 1926-46 to one Harry Fried, and from 1946 has been leased to William Goldman Theatres Inc. The Fried lease from 1936-46 [R. 473] contained and the Goldman lease contains [R. 474-5] a percentage provision entitling petitioner to an additional rental based upon the volume of business done at the theatre.

The Court of Appeals for the Third Circuit on April 6, 1954, rejected all of petitioner's contentions by affirming the judgment on the opinion of the trial court [R. 680-81].

The antecedent Government equity suit.

The *Paramount* case terminated in a judgment holding that the defendants therein had violated Sections 1 and 2 of the Sherman Act. The complaint in the *Paramount* case charged that the defendants as distributors had conspired to restrain and monopolize and had restrained and monopolized interstate commerce in the distribution and exhibition of motion picture films in the United States. The Statutory Court as affirmed by this Court found that defendants had unreasonably restrained trade and commerce in the distribution and exhibition of motion picture films and had attempted to monopolize such trade and commerce in violation of the Sherman Act *inter alia* by (1) conspiring to maintain a nationwide system of runs and clearances substantially uniform in each local competitive area and, (2) fixing a system of runs and clearances which prevented effective competition by outsiders and which was designed to protect the theatre holdings of defendants and to safeguard the revenue therefrom.[5]

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5. The *Paramount* decree incorporates by reference the 160 findings and 16 conclusions entered in support thereof [R. 389]. The textual statement is based upon conclusions of law 7(c)(d) [R. 448]. The *Paramount* defendants attempted to have the Statutory Court frame the conclusions, findings and decree as favorable to themselves as possible because they were admittedly concerned with "defending those treble damage suits which we contemplate as a probability in the light of the decree which you are here making." *Paramount*, Tr. of Record p. 3122. The archstone of the final decree is the provision for theatre-by-theatre, picture-by-picture licensing without discrimination [R. 391-92]. Against that standard of a free market, embodied in the decree, the Statutory Court declared illegal *per se* a system of runs and clearances and devices such as master agreements. Indicative only are decretal paragraphs II, 2 [R. 390]; II, 6 [R. 391]; findings of fact 79 [R. 416], 81 [R. 416-17], 82, 84, 85 [R. 417], 85(a) [R. 417-18], 88 [R. 418], 110 [R. 426-27].

Petitioner's position.

Invoking the benefits of Section 5 petitioner alleged injury from the same conspiracy of which respondents were convicted in the *Paramount* case. To demonstrate the sameness of the conspiracy petitioner introduced into evidence the *Paramount* decree,[6] and then showed the existence in the Philadelphia area of a system of runs and clearances which was established just about the time that Warners acquired its monopoly of theatres in the area, and which system remained static and fixed thereafter. Petitioner showed that as part of the system of runs and clearances in the Philadelphia territory competition was suppressed between petitioner's theatre and the competing Warner affiliated theatre on the Main Line.

The local system of runs and clearances.

Through the testimony of the local branch managers of respondents called as of cross-examination, petitioner showed the existence in the Philadelphia area after the acquisition by Warner of Stanley Company of America[7] in 1928-29 of a system of runs and clearances which remained rigid, fixed and static until *Goldman Theatres Inc. v. Loew's,* (150 F. 2d 738) was decided by the Court of Appeals for the Third Circuit in 1945. In the *Paramount* case the Government used Philadelphia (along with three other cities) to show the pattern of feature film distribution in

6. In addition to the *Paramount* decree and the findings and conclusions entered in support thereof petitioner introduced into evidence the various other consent judgments and decrees which came out of the *Paramount* case, the primary record in the *Paramount* case and also exhibits taken from the *Paramount* record relating to the local area [R. 118-20, 132-33, 224-27].

7. *Paramount* findings 24-32 [R. 405-6] tell the story of the acquisition by Warner by 1931 of a circuit of 591 theatres. With the acquisition of Stanley Company of America Warner acquired 250 theatres (including the Ardmore Theatre on the Main Line) situated in Pennsylvania and New Jersey. The Warner subsidiary companies and theatres owned by them are indicated by the master agreements in the record [R. 340-345, 348, 350].

detail in a metropolitan area where one of the major defendants in the *Paramount* case owned all or practically all of the preferred run theatres.[8] The *Goldman* case was not only referred to by the Statutory Court (66 F. Supp. 323, 334) as showing the pattern of control possessed by the *Paramount* defendants, but Philadelphia was referred to in *Paramount* as one of those areas which were a "closed situation" and by counsel for Warner itself as "a sore spot."[9]

In the system of runs and clearances in Philadelphia Warner had all of the first run downtown theatres, and a virtual monopoly of the first and second neighborhood run theatres. For example, Warner in the 1936-37 season paid 94.1% of the total revenues on all pictures received by all respondents from the three preferred runs in the area. Independents paid only 5.9% of the total revenues obtained by respondents from the area for that season [R. 460].

This system of runs and clearances which prevented competition between independent theatres in the area and Warner theatres and protected the revenue of the Warner theatres, was maintained by a system of licensing by respondents of the Warner theatres under master agreements,[10] and by the maintenance of a Warner-Paramount pool of theatres in the area [R. 335-38] and by a Warner-Fox profit-sharing lease [R. 476-78]. Master agreements were entered into between Warner and other respondents

8. The other three cities where a major defendant controlled the prior run theatres were Kansas City (Fox) (considered in *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.* 194 F. 2d 846); New York (RKO and Loews); Atlanta (Paramount). *Paramount,* Tr. of Record pp. 8-22. In the 1936-37 season respondents derived 99.1 per cent of their revenue from first run theatres in Philadelphia from Warner [R. 459].

9. *Paramount,* Tr. of Record, p. 144, p. 2712.

10. Petitioner introduced some 30 lengthy master agreements into evidence [R. 44-52] (covering the period 1931-1944) parts of which are reproduced in the record [R. 339-380].

under which Warner bought for all of its theatres throughout the country and including the Philadelphia area. Both open and closed situations throughout the country were licensed by Warner under these master agreements.

Before the Ardmore theatre on the Main Line was integrated in 1928 into the Warner circuit that theatre and petitioner's theatre shared the product of respondents. [R. 80, 102, 115, 116, 121, 122]. After the integration of the Ardmore Theatre into the Warner circuit that theatre received the film product of seven respondents first run in the area, while those seven respondents uniformly refused to license petitioner's theatre on the early run. The Warner theatre in the local area was licensed under master agreements which by their terms fixed the run and clearance status of every theatre (both Warner and independent) in the Philadelphia area for a period of one or more years. Respondents' local branch managers admitted that at the sessions in New York City when master agreements were executed, and the earlier run appropriated by Warner for one or more seasons from the particular respondent in question, no independent theatre operator in the Philadelphia area was allowed to be present. Independents, including petitioner's theatre, were sold only after the Warner circuit deal had been made [R. 83, 123-24, 128]. The master agreements used to license the Warner theatre in the local area along with the other theatres in the Philadelphia territory and throughout the country contained those provisions which the Statutory Court held gave local affiliated theatres such competitive advantages over independent competitors as to make those agreements unreasonable discriminations *per se* against such independents [R. 426-27, finding 110; 449, conclusion 8(d)].

The system of runs and clearances in the local area in question was changed in 1940 when two of the seven respondents which had uniformly excluded petitioner from

the earlier run market in favor of the Warner theatre, though continuing to exclude petitioner's theatre from that market, commenced to license a third theatre in the area on the early run. The split of respondents' products, five to the Warner theatre and three to this third theatre was accomplished as the result of a lawsuit and for the joint benefit of all seven respondents since they thereby achieved a release from treble damages sought under the antitrust laws [R. 480].

After 1948 and the *Paramount* injunction, respondents continued to suppress competition between petitioner's theatre and the Warner theatre in the area and refused to allow petitioner's theatre to compete with the Warner theatre on a negotiated basis. Each respondent did, however, offer the opportunity of so-called competitive bidding. The result, however, of exclusion from the earlier run market which had earlier been achieved by the use of master agreements has since 1948 been perpetuated by the use of this device of competitive bidding which, as described by respondents' witnesses, is administered to favor the *status quo ante* the *Paramount* decree.[11]

Respondents' position.

In their own case respondents, with insignificant exception, contented themselves with testimony of New York officers relating to the period after 1948, the period of so-called competitive bidding. In meeting petitioner's prima facie case under Section 5, respondents relied solely upon desultory denials of collaboration and proffered excuses for refusing to license petitioner's theatre on the earlier run, which had been elicited by them in the testimony of their local branch managers called by petitioner as of cross-examination.

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11. [R. 78, 112, 183, 189, 190, 192, 195] Compare the views of this Court on delegating to respondents the management of a system of so-called competitive bidding, 334 U. S. at 163-64.

The submission to the jury.

Petitioner moved at the conclusion of the testimony for a directed verdict upon the ground that respondents had failed to carry the burden of showing that the exclusionary restriction imposed against petitioner's theatre whereby it could not exhibit films until after 7 days had elapsed from the last exhibition thereof at the Ardmore theatre, was not a part of a uniform system of runs and clearances which respondents forwarded in the Philadelphia area, and that respondents failed to rebut petitioner's prima facie case under Section 5 [R. 222-223]. The trial court refused this motion, submitting the case to the jury upon its charge and special interrogatories [R. 262-95].

The trial court excluded the *Paramount* decree as evidence for the jury. Also excluded were the various consent judgments and decrees entered both before and after the final decree of the Statutory Court of February 8, 1950, and the various exhibits taken from the *Paramount* record relating to the Philadelphia area [R. 295-97].

The court, having presented to the jury written interrogatories inquiring first into the reasonableness of the changes of runs and clearances which resulted in petitioner's theatre being relegated to a run and clearance status behind the Warner theatre, and, secondly, and only if the jury found such changes to be unreasonable, inquiring whether such changes were the result of an illegal conspiracy or combination [R. 268] specifically charged the jury in considering the interrogatories that:

> "Of course, if you determine that those clearances imposed generally were reasonable throughout the district there, if you determine they are reasonable, that would be the end of the case. You wouldn't have to go any further. If you find they are unreasonable, then you have to determine whether or not they are

the result of an illegal conspiracy or combination . . ." [R. 274].

After the court's charge counsel for petitioner addressed himself to an objection to this part of the charge. In the following colloquy the trial court stated what it considered the basis of its charge:

> "MR. BALL: I think the rule is that even if clearances are imposed which are normally reasonable but imposed as a result of conspiracy for the purpose of reducing the status of a given competitor's theatre, that the conspiracy is illegal.
>
> THE COURT: I don't see how I can say that without recharging the jury from beginning to end.
>
> * * *
>
> THE COURT: I don't see how, if clearances are reasonable—I don't think it makes any difference whether they were the result of a combination or whether they weren't, if they are reasonable. That is certainly what I told the jury and I can't go over it. I will allow an exception, of course." [R. 280-81]

The following is the only portion of the charge where the trial court undertook affirmatively to tell the jury of the significance of the *Paramount* case:

> "Now, the plaintiff in this case has introduced part of the record in a case which has been called the Paramount case, United States v. Paramount, that was tried in the District Court in New York and went to the Supreme Court of the United States, and in that case it was finally determined that these same defendants were engaged in a nation-wide conspiracy to restrain commerce, control the motion picture business and eliminate competition in favor of theatres owned by the defendants. At that time, a great many theatres, as you

have heard—3,000 of the 18,000 theatres in the United States—were actually owned by these distributors and producers. There are not nearly so many now but some of them are still owned, as the Ardmore is still owned, by Warner Bros., one of these defendants.

"You can take it as prima facie evidence that these defendants were engaged in such a general nationwide conspiracy to suppress competition directed against independent theatre operators and others, and to do so by the use of many devices, such as contracts, price fixing and various provisions in contracts and all that sort of thing, and of a uniform system of clearances to which they adhered and which they used as an instrument of suppressing competition [R. 270-71]."

Thereafter, the trial court devoted its attention to elaborately explaining the negative significance of the *Paramount* case, as follows:

"Now, there is a point, though, that you must consider carefully in connection with that. As I have stated to you, that decree established those facts, and you can take those as at least established by prima facie evidence unless they are controverted. You do not have to accept it. If you believe the defendants' statements here and you believe that they acted independently, then the decree does not compel you to find a verdict for the plaintiff at all. It simply puts the burden on the defendant to explain or to satisfy you that whatever they did was not done as the result of a conspiracy which the Court found to exist.

"This, however, is an important point in connection with that. In this Paramount case the courts said that the defendants used a system of clearances to suppress competition, but they didn't say that they used that method everywhere. They didn't say that all the

clearances that the defendants imposed were unreasonable. They said they did it in some places, and the Bryn Mawr or the Main Line situation in Philadelphia was not mentioned or considered by the courts in the Paramount case. All that the court said was that 'this is a general practice, it has been used all over the United States, it has been used in some places but it hasn't been used in every locality'—and they did not so find.

"That is the way the burden of proof stands, then, between these two parties with regard to the existence of a conspiracy and you must apply it to the facts in this case and determine what the real situation here was, and that brings me back to my question and that is the reasonableness of these particular restraints that were imposed in the Main Line section of Philadelphia.

"There is no question that the Bryn Mawr Theatre ultimately reached a position, through the defendants' licensing—the licensing provisions imposed by the various defendants—where it was only able to get pictures after Ardmore had run the pictures; but we still have to deal with the question of reasonableness and that wasn't determined at all.[12] The question of reason-

12. The trial court in giving the jury "the factors that you consider in determining whether this Bryn Mawr situation, by which Bryn Mawr became a second-run theatre, was reasonable or not?" [R. 273] then adverted to the factors discussed by the Statutory Court, which might legitimatize future clearance provisions between one distributor and one exhibitor negotiating in a free and open market. The trial court thus confused those factors which had been part of the 1940 consent decree and had been used by the Arbitration Tribunal to determine the reasonableness of clearances, with standards of legality under the Sherman Act. The consent decree standards which the Statutory Court stated in its opinion might control the determination of reasonable clearance in the future (66 F. Supp. 331, 342, 357-58) were not embodied in the final decree. By this action the Statutory Court recognized the validity of the Government's arguments that the consent decree standards were wholly inadequate to prevent the use of clearance in a manner which would violate the Sherman Act. Clearances conspiratorially imposed violate the Sherman Act.

able clearances in Bryn Mawr or on the Main Line, Philadelphia, was not determined at all by the Paramount case and so far as proving these clearances and runs that have been established to be reasonable or unreasonable, the burden there is on the plaintiff and you must ask yourselves whether those clearances were reasonable or unreasonable." [R. 271-72]

The trial court summarized:

"All those matters are for you to consider, and remember that your problems are first whether the situation there was reasonable, whether what was done was reasonable, and if it was reasonable [*sic*], whether it was the result of an illegal conspiracy as condemned by the law" [R. 279].

In its sole reference to master agreements the trial court instructed the jury, without more:

"I believe that about covers the case. I have taken longer to charge than I usually do. It has been just an hour, but let me say this, that I haven't dealt with the evidence. Obviously, it would take me a day to go over the evidence here piece by piece, and you have heard it all and you are going to have the exhibits and the documents and you can compare them, you can compare the contracts, you can determine the questions raised about the propriety or impropriety of so-called master contracts and what they were. * * *" [R. 279].

The decisions of the court below.

The trial court's rejection of all of plaintiff's contentions received the approbation of the Court of Appeals. In justification of the basis of its charge that a conspiracy to impose clearances does not violate the Sherman Act if the clearances are "reasonable" the trial court's opinion

sought to justify its position by resort to the so-called "rule of reason" of the *Standard Oil* case.

> "The Court was correct in charging that, if what the defendants did did not unreasonably restrain competition, the fact that they may have acted in concert would not establish a violation of the Act, and that, therefore, if the jury found that there had been no unreasonable restraint, the question relating to the existence of a combination among the defendants need not be answered. * * *" [A. 326].

The question therefore is raised whether the *Paramount* respondents in a private action may completely exculpate themselves—despite the existence of a prima facie case under Section 5 demonstrating conspiracy—by proving the "reasonableness" of clearances imposed as part of a system, or, in other words, whether "reasonable" clearances conspiratorially imposed amount to a violation of Section 1 of the Sherman Act.

With respect to its reference to the *Paramount* case and the rejection of the decree as evidence for the jury under Section 5 the trial court noted:

> "* * * I think that the explanation was adequate, and, it was entirely discretionary with the Court to decline to give the jury the decree to take out with them—a document which would probably have merely bewildered them and brought on discussion of all sorts of extraneous matters" [R. 328].[13]

In denying petitioner's motion for judgment n. o. v., the trial court stated:

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13. At the trial the court had rejected the decree as evidence for the jury upon the ground that "I told them the whole story" [R. 295].

> "• • • The [*Emich*] case decided what matters the prima facie case covered, but there is nothing in the opinion to support the plaintiff's argument that the presumptions arising from the decree in favor of the United States are conclusive and incontrovertible • • •" [R. 329].

Finally, in its opinion, the trial court, though recognizing that it "is not strictly necessary to the disposition of plaintiff's motions to pass upon the point" held that "plaintiff is not a person 'Injured in his business or property' within the meaning of the anti-trust laws and, therefore, is not entitled to maintain this action, regardless of what was shown as to the alleged unlawful conspiracy." [R. 330]. The trial court held that any rights which the petitioner had were "remote, uncertain and insubstantial" [R. 332]. The trial court concluded that "unless a line is drawn excluding remote and indirect injuries to property owners in similar cases, an almost intolerable burden would be placed upon the whole industry." [R. 333].

The Court of Appeals stated that all of petitioner's contentions were "fully considered and correctly decided against the plaintiff in an able and comprehensive opinion . . . We find ourselves in complete accord with his reasoning and conclusions and need add nothing thereto." [R. 681].

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I. This Court's Interpretation of Section 5 of the Clayton Act as Applied to the Paramount Decree Is Important to the Trial and Decision of the Pending Suits in the Motion Picture Industry. It represents an Important Question of Federal Law Which Has Not Been Decided But Which Should Be Decided by This Court. The Decisions of the Courts Below Conflict in Principle With the Emich Case, and With the Paramount Case, and Conflict With Decisions of the Courts of Appeals for the Second, Fifth, Eighth and Ninth Circuits.

A companion interpretation of Section 5 to the *Emich* case as that Section applies to a prior Government decree is not only of importance generally to the administration of the antitrust laws but is specifically needed to settle the procedure and substantive framework in which pending private cases in the motion picture industry are to be decided and determined. The following issues, all specifically undetermined by an Opinion of this Court, are raised in the present case.

1. Refusal to reconstruct the Paramount case.

In the *Emich* case this Court stated that with respect to the antecedent Government case the trial judge "in his instructions to the jury should *reconstruct* that case in the manner and to the extent *he deems necessary to acquaint the jury fully with the issues determined therein*" (340 U. S. at 572). The discretion of the trial judge is one in selection of means; the requirement is that he inform the jury *fully* of the issues determined in the antecedent case.

In the instant case as a result of the trial court's charge containing (p. 15, *supra*) merely a naked formal reference to the *Paramount* case (despite petitioner's 65 [R. 236-252] requests for instructions based on the *Para-*

mount findings and conclusions and decree) and the trial court's rejection of the *Paramount* decree itself as evidence for the jury, the trial judge failed completely to discharge his obligation to tell the jury what had been determined in the *Paramount* case. There was no concrete reconstruction for the jury of the nature and scope of the *Paramount* conspiracy or of the numerous means utilized by respondents to effectuate it. Materials were at hand in the findings and conclusions of the Statutory Court and in the Opinions of this Court and the Statutory Court for instructions to the jury to present a clear and accurate picture of what was actually litigated and determined in the *Paramount* case.[14]

The refusal of the trial court here to give the jury the substance of or to summarize a single finding or conclusion in *Paramount* conflicts in principle with the *Emich* case and with the decision of the Court of Appeals for the Eighth Circuit in *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corporation* (194 F. 2d 846, *cert. denied* 343 U. S. 942).[15]

2. Rejection of the Paramount decree as evidence for the Jury.

In Section 5 Congress made the antecedent Government judgment or decree "prima facie *evidence*" in the

14. This Court recognized in *Emich* that in an antecedent criminal suit the verdict does not necessarily particularize which one of the numerous means of effectuating the conspiracy as alleged in the indictment were found by the criminal jury to have been used by a defendant (340 U. S. at 569). The findings and conclusions in *Paramount* elaborately describe the means used to effectuate the conspiracy.

15. The trial court permitted the introduction into evidence of the petition in *Paramount*, the bill of particulars, the amended and supplemental complaint, the findings of fact and conclusions of law, the final decrees (Tr. of Record 246-48). The trial court allowed plaintiff's counsel to read 48 of the findings and certain conclusions to the jury (Tr. of Record 220-237, 245-248). The Court of Appeals in reliance upon the *Emich* case held that the introduction of the primary record of the *Paramount* case was proper.

private suit. The rejection by the courts below of the *Paramount* decree as evidence for the jury conflicts with this specific Congressional mandate and insulates the jury from the very document which Congress has made evidence in the case. It conflicts in principle with the decision of this Court in the *Emich* case, and particularly so where, as here, the trial court has not discharged its obligation in an essential degree to reconstruct the antecedent Government case. It conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Eastman Kodak Co. v. Southern Photo Material Co.* (295 Fed. 98, aff'd 273 U. S. 359).

3. Failure to make the Paramount decree prima facie evidence of illegal motives of respondents in the use of a system of runs and clearances and master agreements on the local scene.

In the *Emich* case this Court decided that a prior criminal conviction was prima facie evidence (1) of the general conspiracy and (2) of its "effectuation by coercing General Motors dealers to use GMAC" (340 U. S. at 570-71). Left unanswered by this Court was the question whether the antecedent judgment might not *also* establish the impact of the unlawful conspiracy on plaintiff, once evidence of defendants' conduct towards plaintiff was introduced (*Id* at 571 n. 8).

We submit that with respect to *Paramount* and a prior equity decree Section 5 should be interpreted by this Court as giving the private suitor the benefit of the decree as prima facie evidence of (1) the existence of the *Paramount* conspiracy, (2) the means used to effectuate it, and (where those same means are shown by the private suitor to have been used in relation to him) (3) of the illegal motive of respondents in using these same means and of respondents' intention to thereby further the objectives of

the conspiracy.[16] The decisions of the courts below insofar as they reject this contention conflict in principle with the decision of the Court of Appeals for the Eighth Circuit in *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp, supra,*[17]

The question resolves itself into one as to whether a jury may be allowed to say, in face of the *Paramount* decree, that a fixed system of runs and clearances in the Philadelphia area including petitioner's theatre, resulted not from the *Paramount* conspiracy but from the interplay of competitive economic forces at work in a free and open market. This Court has implied the assistance which the private suitor may have from the *Paramount* decree when master agreements were used on the local scene.[18]

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16. Cf. *Government Antitrust Judgments as Evidence in Private Actions,* 65 Harv. L. Rev. 1400, 1406: "Although, as in *Emich,* the verdict may not establish the impact of defendants' unlawful conduct on the plaintiff or the extent of resulting damages, once evidence of defendants' conduct towards the plaintiff is given, the judgment may be of assistance in establishing the improper motive for such conduct. The Supreme Court expressly left this question open in the *Emich* case. But the Court's refinement of the position taken by the court of appeals would have little meaning unless its determination—that the Government judgment was competent evidence of the effectuation of the conspiracy by wrongfully coercing dealers to use GMAC—means that a finding that the cancellation in this instance was wrongful might properly be inferred from the evidence. Particularly where an earlier equity decree has established more specifically the means by which a conspiracy was carried out, the treble-damage plaintiff should be able to use the Government judgment to demonstrate that the motive of the defendants' acts was to further an illegal agreement. * * *"

17. The trial court after summarizing the findings of fact of the *Paramount* case charged that if any of the matters found there "have been proved by plaintiff to have occurred with respect to the Brookside Theatre, you have the right to conclude without further proof on the part of the plaintiff that such acts or things were done by defendants pursuant to their conspiracy or illegal business practices in violation of the Sherman Act described and established in the Paramount case." (Tr. of Record, pp. 2609-10.)

18. In *Partmar Corp. v. Paramount Film Distributing Corp.,* — U. S. — 98 L. ed. (Advance p. 301 at 308-10) this Court noted the limited use of Section 5 with respect to the counterclaim based

4. Individual versus conspiratorial trade restraining use of clearance agreements.

That a *system* of runs and clearances, that clearances imposed by conspiracy, run afoul of the Sherman Act, this Court settled as early as 1923 [19] The illegality of a system of runs and clearances was clearly enunciated by the statutory Court and by this Court in the *Paramount* case (66 F. Supp. 323, 341-43; 334 U. S. 131 at 145).

Nevertheless, the charge of the trial court affirmed by the Court of Appeals was admittedly predicated upon the contrary premise (p. 14, *supra*).

The courts below held that in a private suit under Section 5 averring the refusal to license petitioner's theatre and the suppression of competition between petitioner's theatre and the Warner affiliate in the area by the uniform imposition of clearance provisions in favor of the Warner theatre, respondents may be exculpated by the jury upon a bare finding of the so-called reasonableness of those clearance provisions despite the fact that they were imposed as part of the *Paramount* conspiracy and as part of a system of runs and clearances maintained by master agreements. The factors which the trial court gave to the jury to determine the issue of the reasonableness of the clearances were those described by the Statutory Court (66 F. Supp. at 343) which were applicable only to future clearances negotiated in a free market:

> "The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors

upon the use of a franchise. In the *Paramount* case this Court affirmed the findings of the Statutory Court on the illegality of master agreement (334 U. S. at 156).

19. *Binderup v. Pathe Exchange*, 263 U. S. 291, 312. Also, *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 232; *United States v. Crescent Amusement Co.*, 323 U. S. 173, 183-84.

in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold it to be in violation of the Sherman Act." (66 F. Supp. at 343.)

The courts below, thus, made the factors pertaining to the possible reasonableness of clearance provisions "resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors" the sole standards of legality under Section 1 of the Sherman Act of restraints of trade involving clearances, and have eliminated completely consideration of the elements of conspiracy, suppression of competition, and exclusion from the market.[20]

This Court has said that:

"* * * In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords. * * * Clearances

20. In *Mission Theatres Inc. v. Twentieth Century-Fox Film Corp.*, (D. C. Mo., 1950) 1950-51 Trade Cases, ¶ 62,702 it was held: "In the consent decree, which was to be binding for only three years, a rule of thumb was set up by which the arbitration tribunal could decide whether a clearance was reasonable or unreasonable. An examination of the factors which the tribunal was to consider reveals that the rule of thumb does not establish a standard of reasonableness the same as does the Sherman Act. * * *" Cf. *Paramount*, 66 F. Supp. at 330. This Court in speaking of clearances which were fixed as part of circuit buying power noted: "* * * But any clearance so obtained, *though otherwise reasonable*, would be unlawful, for it would be the product of the exercise of monopoly power. * * *" (Emphasis added.) *Schine Chain Theatres v. United States*, 334 U. S. 110, 124.

have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. * * *" (334 U. S. at 148)

This rule, now the law of the Third Circuit, conflicts with the *Paramount* case. It conflicts with the rejection by the Court of Appeals for the Second Circuit of a similar direction by the trial court to find for respondents upon the sole finding of reasonableness of the clearances involved in *J. J. Theatres Inc. v. Twentieth Century-Fox Film Corp.* The complaint in that case alleged that the refusal to license first run pictures to the plaintiff was in restraint of trade first because the two theatres were not in substantial competition and therefore no clearance provision would be lawful, and secondly because defendants had refused to negotiate for the licensing of first run films on any terms whatsoever. The instruction of the trial court as to the necessity of lack of substantial competition in order for the plaintiffs to recover overlooked the second allegation and thus denied the plaintiffs the right to have that charge submitted to the jury. The Court of Appeals held as a matter of law, agreeing with the plaintiff, that if it were pleaded and proved that the defendants had conspired to deprive the plaintiff of pictures on a first run basis, even though the theatres of both were in substantial competition, that conspiracy might have unreasonably restrained trade in violation of the law.[21]

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21. — F. 2d —, C. C. H. Trade Reg. Reporter, "Current" Court Decisions, ¶ 67,757, pp. 69,431-32.

"The principal contention of the appellants at the trial was that the admitted refusal to license the exhibition of feature motion pictures at the Luxor Theatre on a non-exclusive neighborhood first run basis was an unreasonable restraint of trade because that theatre was not in substantial competition with the Park Plaza Theatre. Considerable evidence was received on the subject of the competitive status of these two theatres and on the whole was such that the jury could justifiably have found either that they were in substantial competition during one or both of the periods involved in this suit or that they were not in

The decisions of the courts below conflict directly on

either period, but for the purposes of this appeal we must assume that the jury found that they were during both periods. So we find it unnecessary in the present aspect of the case to lengthen this opinion by a recital of the evidence on that subject.

The trial judge well and clearly gave the jury to understand that the burden was on the appellants to prove by at least a preponderance of the evidence that the prior run and clearance in favor of the Park Plaza over the Luxor was unreasonable and charged correctly in this respect as to the other elements which they had so to prove to entitle them to a verdict. He also charged that: 'If you find there was substantial competition between the two theatres, then plaintiffs have failed to establish the element that the prior run and clearance in favor of the Park Plaza over the Luxor was unreasonable and your verdict should be for the defendants.' He thus made a finding of no such competition a condition precedent to a finding of unreasonable restraint of trade that would support a plaintiffs' verdict.

The appellants took an exception to that part of the charge and to the refusal of requests to charge which they had timely made to the effect that though their principal contention was that the Luxor and the Park Plaza were not in substantial competition a finding that they were was 'not necessarily fatal to the plaintiffs' case.' And that they could recover if the jury found that the 'defendants and the alleged conspirators, or some of them, acted in concert to refuse first neighborhood run films on the RKO split for exhibition at the Luxor Theatre and that the Luxor was a 'representative first-run neighborhood theatre' in the area; and that 'the defendants and co-conspirators or some of them agreed that none of the distributors of pictures on the RKO split would either license pictures to the Luxor Theatre on a first neighborhood run or negotiate on any terms with the plaintiffs for a first neighborhood run at the Luxor Theatre. * * *'

In limiting the submission of the case to the jury on the plaintiffs' principal theory that there was no substantial competition between the two theatres and making a finding in accord with that theory essential to any recovery, the judge was led inadvertently into error, we think, by the great emphasis which had been put upon that phase of the case. As a matter of law, if it were pleaded and proved that the defendants had conspired to deprive the Luxor Theatre of pictures for exhibition on a first neighborhood run by refusing to negotiate with the plaintiffs on any terms for such a run, even though that theatre and the Park Plaza Theatre were in substantial competition, the conspiracy might have unreasonably restrained trade in violation of the anti-trust statutes. See *U. S. v. Paramount*, 66 F. Supp. 323; aff'd in part and reversed in part and remanded, 334 U. S. 131, and *U. S. v. Paramount*, 85 F. Supp. 881, aff'd 339 U. S. 974. Also *Theatre Enterprises v. Paramount*, 346 U. S. 537.* * *"

the specific point with the decision of the Court of Appeals for the Ninth Circuit in *Chorak v. RKO Radio Pictures.*[22]

5. Erroneous negativing of benefits of the Paramount decree as prima facie evidence of the conspiracy, and the use of illegal means.

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a. Existence of the Paramount conspiracy.

The private suitor in *Emich* was entitled to the benefit of the prior judgment as prima facie evidence of the existence of the conspiracy on the part of General Motors to monopolize and restrain interstate trade and commerce in the financing of cars. Petitioner was entitled here to the benefit of the *Paramount* decree as prima facie evidence of the existence of the national conspiracy to restrain trade and commerce in the distribution and exhibition of motion picture films by conspiring to maintain a system of runs and clearances in each local area, and fixing a system designed to protect the affiliated theatres.

Petitioner's theatre has been in existence since 1926; petitioner related the *Paramount* conspiracy both temporally and spatially to the local scene. The trial court, however, told the jury that respondents did not use a system of runs and clearances everywhere (p. 15, *supra*). Therefore, even having related the *Paramount* conspiracy to the local scene, petitioner did not receive the benefit of Section 5 from this instruction. The trial court went even further and told the jury that the so-called reasonableness of the particular clearances in question "had not been determined at all" in the *Paramount* case, further removing any

22. 196 F. 2d 225, 228: " . . . If from all the evidence, the court concludes that the clearances are reasonable *and* are not the result of or consequent upon any illegal concerted action of the defendants to harm the plaintiffs, then whatever harm may have been visited on appellants is not actionable under the antitrust statutes. * * *"

benefits under Section 5 since even if the jury had been given the question and had determined that the clearances were imposed conspiratorially it was nevertheless instructed that these particular runs and clearances had not been condemned at all in the *Paramount* case either when considered as individually granted or conspiratorially granted. Finally, the trial court placed upon petitioner the burden of showing the so-called "unreasonableness" of the clearances involved.

b. The use of illegal master agreements.

Having evinced its hostility to the use by petitioner of master agreements in examining the respondents' witnesses [R. 43-44, 67], the trial court in its charge in one sentence undermined the petitioner's case and overruled the decisions of this Court making master contracts illegal *per se* (p. 17, *supra*). Despite the *Paramount* decree, conclusions and findings, and despite the Opinions of this Court and the Statutory Court in *Paramount*,[23] the trial court told the jury that it could:

> "Determine the question raised about the propriety or impropriety of so-called master contracts and what they were." [R. 279]

The error of the trial court in its charge is similar to the error which this Court found in the *Griffith* case:

> "* * * The District Court, having started with the assumption that the use of circuit buying power was wholly lawful, naturally attributed no evil to it, and thus treated the master agreements as legitimate

23. Master agreements are illegal *per se: Paramount* decree, II, 6 [R. 391]; findings 88 [R. 418], 110 [R. 426]; conclusions 8 (f) [R. 449], 10 [R. 450]. Also, 66 F. Supp. at 347, 352, 358; 334 U. S. at 154. Warners bought for open and closed towns under the master agreements used to license its Main Line theatre. *Cf.* the *Griffith* (334 U. S. at 108) and *Schine* (334 U. S. at 116) cases.

weapons of competition * * * These findings are plainly inadequate if we start, as we must, from the premise that circuit buying power was unlawfully employed. * * *" (334 U. S. at 109).

6. Necessity of directed verdict upon unrebutted prima facie case under Section 5.

With or without the additional benefits contended for here from the *Paramount* decree of the illegal motivation of respondents' utilization of a system of runs and clearances on the local scene and master agreements, petitioner's prima facie case on liability was made out. The motion for a directed verdict raised solely a question of law—the legal sufficiency of any evidence produced by the respondents to take the case to the jury.

Congress did not in Section 5 give an authoritative definition of the term "prima facie evidence" as included in the statute.[24] Under the decisions of this Court, however, prima facie evidence if unrebutted cannot be rejected by the jury, and therefore a directed verdict is mandatory.[25]

Taking every intendment from the evidence in favor of respondents, there is still no legally probative evidence in this record which could support a finding of the jury that there was no system of runs and clearances or that there was no nation-wide conspiracy (assuming *arguendo* that that issue was passed upon by the jury). Respondents did not create any issue with respect of these matters. Such evidence as is contained in the testimony of the respond-

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24. This Court did not disturb the trial court's definition given in the *Emich* case: "Prima facie proof or evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed, and if not refuted remains sufficient for that purpose. * * *" (Tr. of Record p. 7439).

25. *Kelly v. Jackson*, 6 Pet. 622, 632; *Meeker v. Lehigh Valley R. Co.* 236 U. S. 412, 430-31; 236 U. S. 434, 439. 5 Moore, FEDERAL PRACTICE, 2314 (2d ed.).

ents' local branch managers was vitiated by their own admissions as to the existence of the system of runs and clearances and to the utilization of master agreements. The documentary evidence consisting of master agreements, and exhibits taken from the *Paramount* case negatives the oral testimony of respondents' witnesses as to no collaboration and as to free market licensing of petitioner's theatre. This vitiation of the oral testimony of respondents' witnesses converted that testimony into stock excuses which lost any legal probative value which they might otherwise have had.[26] Unlike *Theatre Enterprises,* where respondents were able to raise factual questions as to the existence of a conspiracy *post* the *Paramount* decree which required submission to the jury,[27] the instant record is bare of any such issue, since in addition to the uncontradicted documentary evidence, the decree itself negatived that testimony.

II. The Decisions of the Courts Below That the Landlord-Owner of a Theatre (the Run and Clearance Status of Which Was Admittedly Fixed as a Result of the Paramount Conspiracy) Can Not Bring a Private Suit Under the Antitrust Laws Raises an Important Question of Federal Law Which Has Not Been But Which Should Be Decided by This Court.

While this Court has had occasion to pass upon Section 8 of the Sherman Act insofar as that section expands

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26. Cf. *United States v. Crescent Amusement Co.,* 323 U. S. 173, 183.

27. In *Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.* 346 U. S. 537 because of the temporal, spatial and subject matter differences between that case and the *Paramount* case, this Court held the *Paramount* decree but "slightly relevant", and the Court of Appeals held that the *Paramount* decree "had no relation" to the Crest theatre. Since plaintiff in that case had to prove a conspiracy *after* the *Paramount* conspiracy was enjoined in 1948, different from the *Paramount* conspiracy, the testimony of the distributors' witnesses could raise factual issues requiring submission to a jury.

the meaning of "any person" in Section 7, this Court has not directly passed upon the scope of Section 7. The decisions of the courts below squarely present the question of whether the owner of a theatre is a "person" within the meaning of the language of Section 7, giving a cause of action to "Any person who shall be injured in his business or property . . ." (Section 4 of the Clayton Act).

The decisions of the courts below placing petitioner as a theatre owner outside of the umbra of protection of the antitrust laws, conflicts in principle with the decision of this Court in *Chattanooga Foundry & Pipe Works v. City of Atlanta*[28] (203 U. S. 390), and if based upon the

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28. This Court *per* Holmes J. held that the City of Atlanta had been injured in its property, if not in its business, of furnishing water by being led to pay more than the worth of certain pipe because of violations of the antitrust laws. Mr. Justice Holmes pointed out that the Congressional language has not merely given remedy for injuries *to* property, but to one "injured *in* his business or property," a much broader concept. This Court affrmed the judgment of the Circuit Court of Appeals for the Sixth Circuit (127 Fed. 23). Nothing in the Opinion of this Court conflicts with the views of the Circuit Court (at 27-28): "* * * That such a plaintiff is entitled to recover the damages thus sustained in his business whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. v. United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw that wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to 'any person' 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement."

premise of the speculativeness of the damages it conflicts with the decision of this Court in *Bigelow v. RKO Radio Pictures* (327 U. S. 251).

There is nothing in the scope of the Congressional language, the history of the antitrust laws, or the appropriate construction of the antitrust laws or their administration, which justifies so unwarranted a restriction.[29]

Choked off from a supply of films on the early run, a theatre is unable to produce those higher profits which go with earlier run exhibition; the value of the theatre property consequently decreases. The owner of such a theatre, though he has leased it to another under a percentage lease, suffers a proportionate loss of the profits which might have otherwise been made, and suffers the entire amount of diminution in the value of the theatre property.

The practical effect of the decisions below is to remove from the protective scope of the antitrust laws that very class of persons having a direct financial interest in the business done at a motion picture theatre. This result has been achieved in face of the findings in the *Paramount* case that it was the small independent theatre that had most keenly felt the discriminatory practices and predatory activities of respondents (334 U. S. at 162), and the findings

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29. Until the decision of the trial court the two district courts which had met the specific issue had refused to create any such unwarranted restriction. In *Camrel Co., Inc., v. Paramount Film Distributing Corp.* (D. C. N. Y. 1944) C. C. H. Trade Reg. Rep. 1944-47 Court Decisions ¶ 57,233, the allegations in the complaint as to damages were held not too remote and speculative when the complaint charged that the rental and market value of plaintiff's theatre and the percentage income under a lease to the theatre operator were reduced by defendants' illegal restraint of trade and agreement. In *East Orange Amusement Co. v. Vitagraph Inc.* (D. C. N. J. 1943) *Id.* 1941-43 Court Decisions ¶ 52,965 it was held that the owner of a motion picture theatre although not the operator of the theatre, is a person "injured in his business or property" within the meaning of the Sherman Act, and was entitled to sue for damages caused to its business and property by practices of defendants.

in *Paramount* as to the policy of discrimination of respondents against their independent competitors.[30]

III. This Court's Determination of the Amount of Practical Assistance Which Private Suitors Will Obtain From Section 5 as Applied to the Paramount Decree Will Have a Serious Impact Upon the Administration of the Antitrust Laws.

This Court's resolution of the issues here posed is important to private motion picture antitrust litigation pending and to the administration of the antitrust laws generally.

Respondents in the *Paramount* case did not submit to prompt capitulation. They vigorously contested their liability for more than ten years. If, after that arduous contest by the Government against the larger units of the industry, the private suitor who was the victim of the *Paramount* conspiracy is to have no real practical assistance from Section 5, then the decision of the *Paramount* defendants not to promptly capitulate will have justified itself. If they are faced now with private suitors having only a devitalized remedy and if they can successfully object that a private suitor falls into an artificially delimited class of persons who may sue, they will have had their cake and the penny too.

The Department of Justice, in its administration of the antitrust laws will have to write off private suits as an ancillary force[31] policing the antitrust laws.

We feel that the writ should issue not merely to reverse the judgment below insofar as this Court believes it to be in conflict with the decisions of this Court, but also for the

30. Decree, II 8 [R. 391-92]; conclusions 7 (d) [R. 448], 8 (d) [R. 449], 9 (d) [R. 450]; findings 84, 85, 85 (a) [R. 417], 110 [R. 426-27]; 334 U. S. at 159-61.

31. *United States v. Borden Co.*, — U. S. — 98 L. ed. (Advance p. 601 at 604).

reason that the important questions of federal law raised herein, and upon which no Opinion of this Court exists, warrant decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 196.

F. E. HARRISON,

Petitioner,

v.

PARAMOUNT PICTURES, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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October Term, 1954. No. 196.

F. E. HARRISON,
Petitioner,

v.

PARAMOUNT PICTURES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

1. In this private action under the antitrust laws alleging a conspiracy, were not the courts below correct in rejecting petitioner's motion for a new trial since the charge of the trial judge, (a) fairly and fully put to the jury the issues involved; (b) complied with the Emich case in explaining U. S. v. Paramount; and (c) gave full effect to the Paramount decrees as prima facie evidence?

2. Were not the courts below correct in refusing to grant judgment n. o. v. where the jury returned a general verdict for the respondents on ample evidence, clearly showing that in the situation involved in this action each respondent had acted independently, reasonably, and for its own proper business purposes?

3. Were not the courts below correct in concluding, as an additional ground for dismissing petitioner's motion, that the owner of a theatre, who for over 20 years leased it to operators, the owner reserving no control and not participating in its operation, has no cause of action under the antitrust laws against respondents, with which the owner never had any business transactions?

STATEMENT OF THE CASE.

The petitioner, plaintiff below, is the owner of the Bryn Mawr Theatre in Bryn Mawr, Pennsylvania, just west of Philadelphia, on what is known as the Main Line. To the east of Bryn Mawr, closer to Philadelphia, is Ardmore, which has two theatres, the Suburban, operated by Harry Fried, and the Ardmore, operated by Warner.

Ardmore is bigger than Bryn Mawr and its theatres are better. Motion pictures play in Ardmore about a week before they play in Bryn Mawr.

To the west of Bryn Mawr is Wayne, where Fried has another theatre, the Wayne. For many years, pictures have played in Wayne at the same time as in Ardmore, particularly those which played at Fried's Suburban.

Beginning in 1926, Fried was the lessee of petitioner, and the operator of the Bryn Mawr. Since 1947, petitioner's tenant and operator has been William Goldman.

Petitioner owner and landlord, a stranger to the motion picture distributors, brought this suit under the antitrust laws against the distributors and a competitor exhibitor, complaining that her tenant Fried licensed pictures for her Bryn Mawr, after Ardmore and Wayne, because of the compulsion of a conspiracy. Significantly neither Fried nor Goldman joined in the action, nor was Fried named as a defendant.

After a full trial, limited by agreement to the issue of liability, the jury found for the defendants.

That is all there is to this litigation.

Runs and Clearances Until 1940.

The manner in which the distributors licensed pictures on the Main Line until 1928, is not challenged by petitioner as dictated by any consideration except the selection of customer theatres based on their profit potentialities.

Yet, in 1926, when Stanley Company of America which later became affiliated with Warner bought the Ardmore from William LaPortes, the Ardmore was the only first-run theatre on the Main Line, as it had been since 1921 (R. 115a-116a). There was no change in the situation between the time Stanley bought the Ardmore and the time Warner acquired control of Stanley in 1928 (R. 10a).

There is no evidence that the changes that the distributors made after Warner acquired control of the Ardmore were motivated by anything other than proper business considerations.

Columbia licensed pictures to the Ardmore for first run Main Line in the 1930-31 season. Previously it had not dealt with Warner because in Warner's judgment Columbia's product was not good enough (R. 80a). Columbia changed from the Bryn Mawr to the Ardmore because the improved quality of its product enabled it to license to Warner, and because Columbia found that Fried "wasn't too desirable a customer" (R. 83a-84a).

In 1930 Paramount took its pictures from Warner's Ardmore and licensed them to the Bryn Mawr on a first-run basis (R. 102a). This shift was not favorable to Warner, for it deprived the Ardmore of a product which it had had since 1921 (R. 545a). Paramount later returned to the Ardmore after experience showed that the Bryn Mawr earned for Paramount 35 to 40% less than the Ardmore had (R. 538a-539a).

The only other change in the early thirties was in connection with Loew's. Petitioner's witness Applegate, a former branch manager of Loew's, admitted that Loew's did not change to the Ardmore for at least two or three years after Warner acquired the Ardmore (R. 554a). He admitted also that this change resulted when Loew's and Fried had difficulties "which were so acute that [Loew's] decided to change the account because of them" (R. 564a). He further stated that there was cheating at Fried's box

office (R. 565a-566a) and that he, Applegate, independently took the run from Fried and gave it to the Ardmore (R. 141a, 142a).

The next change occurred when Fox stopped licensing to Warner's Ardmore, and commenced licensing to Fried's Bryn Mawr and then to Fried's new Suburban when it was built in 1937 (R. 131a, 560a).

This covers the period referred to by the first of two interrogatories submitted to the jury, which was whether the changes in runs and clearances from and after 1928 were unreasonable (R. 268a). The jury replied in the negative.

In 1938, Fried sued the distributors other than Fox, demanding their pictures first run for his Suburban. The case was settled when Columbia and Paramount agreed to license pictures to the Suburban. After the settlement, Fried had no complaints (R. 626a-627a). He operated his Suburban, which he had under lease, on first-run Main Line, and the Bryn Mawr, under lease from petitioner, on a run subsequent to the Suburban and the Ardmore.

The tremendous prominence given by petitioner to **U. S. v. Paramount** and her great emphasis on Warner "domination" in the Philadelphia area indicated that the basis of her action was that Warner was preferred, not on merit but as the result of coercion. Yet the settlement of the Fried litigation clearly harmed Warner's Ardmore since it reduced the Ardmore's supply of pictures.

Runs and Clearances after 1940.

The next change in the picture situation among the four Main Line theatres in the 23 year period covered by petitioner's suit (1928-51), was the placing of Fried's Wayne on a day and date basis with either Warner's Ardmore or Fried's Suburban.

Petitioner complained that this occurred in 1947 and resulted in harm to the Bryn Mawr, then being operated by Goldman, because it enabled the Wayne to play ahead of the Bryn Mawr. The fact is that the Wayne had played ahead of the Bryn Mawr long before 1947 (R. 512a, 521a).

From the time Fox began serving the Suburban in 1937 and Paramount and Columbia began serving the Suburban in 1940, none of these companies gave clearance to Fried's Suburban over his Wayne, because in the opinion of each the Wayne was not a substantial competitor of the Suburban (R. 530a-531a, 539a, 89a-93a). Consequently, even before 1947, Fried played many pictures at his Wayne at the same time as at his Suburban, and before his Bryn Mawr.

Fried had asked the other distributors to follow the example of Fox, Paramount and Columbia in eliminating the clearance in favor of Warner's Ardmore over the Wayne. As a result, four of the distributors, at different times, during 1946 and 1947, removed the clearance of the Ardmore over the Wayne and licensed the Wayne on the same run as the Ardmore (R. 32a, 76a-77a, 97a, 620a). The testimony showed that the four distributors eliminated the clearance because neighborhood changes indicated that the Wayne and the Ardmore were no longer substantially competitive. This loss of clearance hurt Warner's Ardmore (R. 512a, 525a-526a).

Petitioner asserts (p. 9) that she showed the existence of a system of runs and clearances in the Philadelphia area which was established when Warner acquired its theatres. The foregoing shows the contrary. Runs and clearances were not initiated when Warner acquired the Ardmore, since they had existed in the area long before; and far from being fixed, they changed frequently thereafter.

Competitive Bidding.

The experience of the distributors with Goldman demonstrates that their dealings with respect to the Bryn Mawr were motivated only by their respective determinations of their individual business interests.

In response to a request by Goldman (R. 658a-659a), each distributor gave him an opportunity to bid for pictures, and he still has it. After a thorough trial of bidding, during which he won a substantial number of pictures, Goldman voluntarily gave it up (R. 165a, 496a-498a, 513a-515a, 531a-532a, 606a-608a).

The reason for Goldman's action is explained by testimony that "Bryn Mawr makes more profit at lower film rentals than by paying the 40 per cent for the first run." An example was cited of a picture for which the Ardmore paid $1600 on first run and the Bryn Mawr $100 on second run (R. 498a-499a).

There was no complaint by Goldman since he requested and received competitive bidding (R. 498a). Accordingly, petitioner's statement (p. 12) that after 1948 the respondents continued to suppress competition between the Bryn Mawr and Ardmore Theatres is without support in the record. It is directly contrary to the jury's negative answer to the second interrogatory submitted to it, namely, whether the changes in runs and clearances on the Main Line after 1940 were the result of an illegal conspiracy to damage the Bryn Mawr (R. 268a).

After the jury rendered a general verdict for respondents, petitioner moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The District Court denied these motions (R. 326a-334a), and the Court of Appeals affirmed per curiam on the opinion of the trial court (R. 680a-81a). The petition for certiorari followed.

Argument.

I.

THE LOWER COURTS' APPLICATION OF SECTION 5 OF THE CLAYTON ACT WAS CORRECT.

The first major reason advanced in support of the petition for certiorari is that the trial court's interpretation of Section 5 of the Clayton Act was improper, and conflicts with the **Emich** case, the **Paramount** case and decisions of specified Courts of Appeals (p. 20).

The same contention was advanced in **Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.**, 346 U. S. 537 (1954), but rejected by this Court.

A. The Trial Court Complied With the Emich Case in Explaining U. S. v. Paramount.

Petitioner contends that the trial judge failed to "reconstruct" the prior Government case in accordance with the **Emich** case (p. 20).

The rule for explaining a prior decree is set forth in the **Emich** case by Mr. Justice Clark:

> "* * * It is the task of the trial judge to make clear to the jury **the issues**[1] that were determined against the defendant in the prior suit, and **to limit to those issues** the effect of that judgment as evidence in the present action. As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge, who must take into account the circumstances of each case. He must be free to exercise 'a well-established range of judicial discretion.' * * *" (340 U. S. 558, 571).

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1. Wherever bold face appears in this Brief the emphasis is ours.

Did Judge Kirkpatrick "make clear" to the jury the issues decided in **U. S. v. Paramount**, which were relevant here?

His charge demonstrates that he did. He said it was determined in the **Paramount** case that respondents were engaged in a nationwide conspiracy to control the motion picture business and to eliminate competition in favor of theatres owned by them. The decree, he continued, is *prima facie* evidence that in the **Paramount** conspiracy respondents used various means to suppress competition (R. 270a).

He then said that the **Paramount** case did not hold that respondents used clearances to suppress competition **everywhere** and that the Main Line was not mentioned in the Government case. Therefore, although the Bryn Mawr reached a position where it obtained pictures only after the Ardmore, there remains the question of reasonableness of clearance on the Main Line (R. 272a).

He referred to the **Paramount** case in specifying factors to consider in determining whether clearances between theatres on the Main Line were reasonable, and stated:

> "* * * if the real purpose here was simply to favor the Warner theatre, which was the Ardmore Theatre, for various reasons—you have heard about the situation in Philadelphia where Warner had a tremendous buying power, as did the Warner theatres all over the country, and the condition of the whole industry, and the fact that these monopoly powers undoubtedly did, or at least were found by the decree of the court to exist—and if the sole purpose was not a reasonable business purpose but was merely to keep a favored theatre ahead of a competitor, then you could find that the clearances were unreasonable. * * *" (R. 274a)

Thus, in terms of the **Emich** rule, Judge Kirkpatrick "explained the scope and effect of the former judgment on the case at trial", doing so "in the manner and to the extent * * * necessary to acquaint the jury fully with the

issues" determined there as they affected the present issues, 340 U. S. 558, 572.

In **Theatre Enterprises**, this Court ruled untenable petitioner's contention that the trial judge erred by inadequately charging on the scope and effect of the **Paramount** decrees.

After emphasizing the discretion of the trial judge to "choose the precise manner of explaining a decree to the jury", Mr. Justice Clark quoted part of the charge relating to the **Paramount** case, and then rejected the argument that these instructions were "so superficial and so limited" as to deprive plaintiff of the benefits of Section 5:

> "'• • • The trial judge instructed, in effect, that the **Paramount** decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed **Paramount** conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The **Paramount** decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the nub of plaintiff's claim. • • •'" (p. 543).

Judge Kirkpatrick explained the **Paramount** case at least as fully as did the trial court in the **Theatre Enterprises** case.

Petitioner contends that the trial judge should have read to the jury from the **Paramount** case the conclusions of law, findings of fact and decrees (p. 21). She claims that Judge Kirkpatrick's failure to do so "conflicts in principle" with **Brookside Theatre Corp. v. Twentieth-Century Fox Film Corp.**, 194 F. 2d 846 (C. A. 8, 1952). This claim is wholly without foundation as nothing in the **Brookside** case suggests that a trial judge, in his charge, must quote

or summarize the findings and conclusions in the **Paramount** case.

In view of the length and complexity of the decrees, findings and conclusions (which are set forth at 388a to 451a), reading them would, in the opinion of the trial court, have "bewildered" the jury (R. 328a). This, the court in its sound exercise of discretion, refused to do.

In any event, petitioner's counsel took no exception to the manner in which Judge Kirkpatrick dealt with the **Paramount** case on this point. At the conclusion of the charge, counsel were invited to specify any matters which, in their opinion, were omitted or incorrectly stated (R. 280a). Petitioner's counsel attempted to except generally to the court's failure to submit his 135 points for charge (283a). The court refused to allow a general exception and insisted on specific exceptions. The one exception taken by petitioner was not on this point (R. 284a).

B. There Was No Error in Not Sending Out With the Jury the Paramount Decrees.

Petitioner misleadingly argues that there was error in the trial judge's "rejection of the **Paramount** decree as evidence for the jury" (p. 21).

Since all the **Paramount** decrees offered by petitioner were admitted into evidence (R. 132a, 133a), the only possible construction of her complaint regarding the decrees is that they were not physically sent out with the jury.

Petitioner made no request that the decrees go out, and certainly made no objection to not having them sent out (R. 295a-296a).

Even if there had been an objection, there was no error. The sending of exhibits with the jury is within the discretion of the trial court. **Murray v. United States**, 130 F. 2d 442 (C. A. D. C. 1942) and **Pinn v. Lawson et al.**, 72 F. 2d 742 (C. A. D. C. 1934).

The fact that the exhibit is a Government decree in an antitrust case makes no difference. See Mr. Justice Clark's opinion in the **Emich** case at pp. 571-572.

The only case cited by petitioner in support of her argument is **Eastman Kodak Co. v. Southern Photo Material Co.**, 295 Fed. 98 (C. A. 5, 1923), aff'd. 273 U. S. 359. There is no indication that any decree was sent to the jury in that case, and there is no holding or statement in that case that a trial court is obliged to send a prior decree to the jury.

C. The Trial Court Gave Full Effect to the Paramount Decree as Prima Facie Evidence.

Petitioner contends that the trial court erred in failing to make the **Paramount** decree *prima facie* evidence of respondents' illegal motives in the use of runs and clearances or master agreements on the local scene (p. 22).

Since this contention is now made for the first time, in no event does it constitute grounds for granting a petition for certiorari. Rule 19(1)(b) of this Court.

Furthermore, the argument is based on another misstatement of the record.

Judge Kirkpatrick said that where there has been a decree in a prior Government case, the burden of proof is shifted to the defendants so that if any of the challenged acts are covered by the prior decree, **the burden is on the defendants** to show that there was no conspiracy or that the elements covered by that decree are to be resolved favorably to **defendants** in so far as the local situation is concerned (R. 270a-271a).

He stated that before the respondents could escape from the *prima facie* effect of the **Paramount** decree, the jury (1) had to believe respondents' testimony in this case, (2) had to believe that respondents had "acted independently", and (3) had to be satisfied that respondents had met **their burden** of showing that "whatever they did [re-

garding runs and clearances on the Main Line] was not done as the result of a conspiracy" (R. 271a).

Judge Kirkpatrick then made it clear that if the Main Line runs and clearances were imposed in order to suppress competition and in order improperly to favor the theatres in Ardmore over Bryn Mawr, they would have been unreasonable (R. 274a).

The charge, with the *prima facie* effect given to the **Paramount** decrees, imposed on **respondents** the burden of satisfying the jury that the Main Line runs and clearances had as their "sole purpose * * * a reasonable business purpose" and were not intended "merely to keep a favored theatre ahead of a competitor" (R. 274a).

The foregoing was precisely the effect of the charge of the trial court in **Brookside Theatre Corp. v. Twentieth Century-Fox Film Corporation**, 194 F. 2d 846 (C. A. 8, 1952), cert. denied, 343 U. S. 942; and the present case is not, as petitioner suggests (p. 23), in conflict with the **Brookside** case on this point.

At the end of this portion of her argument, petitioner attempts to create the impression that the mere introduction of the prior **Paramount** decree requires the jury to find a conspiracy (p. 23). That contention was categorically rejected by this Court in the **Theatre Enterprises** case, 346 U. S. 537, at 543.

Similarly, petitioner contends by implication from **Partmar Corp. v. Paramount Film Distributing Corp.**, 347 U. S. 89 (1954), that the mere use by the distributors of master agreements requires a finding of liability. That case does not support such contention, and in fact indicates the contrary.

D. The Court Charged Correctly on the Applicable Law.

Petitioner claims that the charge was predicated on the premise that the antitrust laws are not violated by a system

of runs and clearances, or by clearances imposed by a conspiracy (p. 24).

She complains further that the trial judge improperly charged regarding application of the standards set down by the Expediting Court and by this Court (66 F. Supp. 331, 342; 334 U. S. 131, at 145) for considering clearances, in that the judge eliminated "the elements of conspiracy, suppression of competition and exclusion from the market" (p. 25).

Petitioner now contends that the factors enumerated in the **Paramount** case for determining the reasonableness of clearances "are applicable only to **future** clearances" (p. 24 and p. 16, n.12). This contention was not made in the trial court, or in the Court of Appeals, and is not supported by **U. S. v. Paramount** or by any other case.

As Judge Kirkpatrick stated in his opinion, petitioner's "criticism of the charge of the court is directed against one or two sentences which have to be taken completely out of context in order to furnish any basis for [her] argument" (R. 326a).

Petitioner completely ignores the statement in the charge that "a combination to suppress competition is an illegal combination" (R. 264a). She ignores also the part of the charge in which the court stated (immediately after specifying the factors for considering clearances) that "if the real purpose here was simply to favor the Warner theatre * * * and if the sole purpose was not a reasonable business purpose but was merely to keep a favored theatre ahead of a competitor, then you could find that the clearances were unreasonable", and, of course, illegal (R. 274a).

Petitioner claims that the charge in the present case is in conflict with the principles set forth in **J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.**, 212 F. 2d 840 (CA 2, 1954), and with **Chorak v. RKO Radio Pictures**, 196 F. 2d 225 (CA 9, 1952), cert. den. 344 U. S. 887. She is wrong in both instances.

In the **J. J. Theatres** case, plaintiffs claimed that their Luxor Theatre was entitled to license pictures on a first neighborhood run. The principal basis of the claim was that the Luxor was not in substantial competition with the Park Plaza and was, therefore, entitled to exhibit the same pictures at the same time. Plaintiffs also advanced a secondary claim that even if there were substantial competition between the theatres, the Luxor nevertheless was entitled to an opportunity to negotiate for pictures on that run.

The trial court charged that if the jury found the Luxor and Park Plaza to be in substantial competition, they were to find for defendants. The jury so found. The Court of Appeals held that the trial court erred in not submitting the totality of plaintiff's claims, both primary and secondary.

The **J. J. Theatres** case was wholly different from this case. Factually, the Bryn Mawr was in substantial competition with the three other theatres in the area, and the operator of the Bryn Mawr was given the opportunity to obtain and did obtain, pictures on a first neighborhood run. Procedurally, the instructions of Judge Kirkpatrick covered every possible phase of petitioner's case. He made it clear that if the clearances were imposed for **any** improper purpose, the jury should find for petitioner. The charge afforded the jury full opportunity to test the over-all conduct of respondents.

Neither is there any conflict with the decision in the **Chorak** case from which petitioner cites one isolated sentence (p. 28, n. 22).

There the court held that a **recovery** under the antitrust laws depended upon a determination "whether or not clearance restrictions imposed * * * were the result of a concerted course of action * * * *and* whether or not the clearance restrictions * * * were unreasonable" (196 F. 2d at 228).

Significantly, this principle is emphasized in the part of the **Chorak** opinion immediately preceding the sentence quoted by petitioner. The opinion there demonstrates that court's agreement with the position taken in the present case that an essential element in plaintiff's action is that the challenged conduct shall have resulted in an unreasonable restraint of trade, and only if the element of unreasonableness is found is it necessary to consider whether plaintiff was injured thereby.

In any event the jury in the present case, by its verdict in the light of the principles stated in the charge, found respondents' conduct to have been reasonable and not in violation of the anti-trust laws.

E. Petitioner's Other Complaints About the Charge Are Likewise Without Merit.

Petitioner claims that the trial court erred by not giving her the full *prima facie* effect of the decree in the **Paramount** case as to (1) the existence of the **Paramount** conspiracy; and (2) the existence of "master agreements" (p. 28).

Regarding the **Paramount** conspiracy, petitioner complains that the trial court erred in stating that the distributors did not use a "system" of runs and clearances **everywhere**, and that the reasonableness of the clearances in Bryn Mawr had not been determined (p. 28).

The applicable portion of the charge is that which followed Judge Kirkpatrick's instruction that the jury could take as *prima facie* evidence from the **Paramount** decree that these defendants had engaged in a general nationwide conspiracy to suppress competition (R. 270a). The trial judge stated:

> "• • • In this Paramount case the courts said that the defendants used a system of clearances to suppress competition, but they didn't say that they used that

method everywhere. They didn't say that all the clearances that the defendants imposed were unreasonable. They said they did it in some places, and the Bryn Mawr or the Main Line situation in Philadelphia was not mentioned or considered by the courts in the Paramount case. All that the court said was that 'this is a general practice, it has been used all over the United States, it has been used in some places but it hasn't been used in every locality'—and they did not so find" (R. 271a).

This part of Judge Kirkpatrick's charge is almost identical with the part of the charge quoted with approval by Mr. Justice Clark in the **Theatre Enterprises** case, at page 542.

As to master agreements, petitioner complains that the trial judge erred in refusing to charge "that the master contracts * * * in evidence * * * were illegal per se" (R. 284a). This ruling, we submit, was proper.

The **Paramount** case did not condemn all master agreements. Judge Hand stated that such agreements are objectionable when they permit the exhibitor to allocate film rental among theatres as it sees fit and when they leave other terms to the exhibitor's discretion; but such agreements are not objectionable when they merely contain in a single document provisions covering the licensing of pictures for particular theatres (66 F. Supp. 323, 347).

The agreements in this case, as the witnesses testified, were merely clerical devices to record on one document a series of negotiations by one distributor with Warner, which had numerous theatres (R. 74a-75a, 82a, 123a-124a, 138a-139a, 153a). Consequently, these agreements are not the type found objectionable in the **Paramount** case.

In any event, petitioner's contention is of no avail since she did not demonstrate that the so-called master agreements were used to harm her or were responsible for the clearances over the Bryn Mawr.

Petitioner states (p. 10) that the "system of runs and clearances which prevented competition between independent theatres in the area and Warner theatres * * * was maintained" by master agreements. There is absolutely nothing in the record to support such a statement. On the contrary, the record demonstrates that there was no relationship between the clearances over Bryn Mawr and the master agreements.

For example, when La Portes operated the Ardmore from 1921 until 1926 it had first-run Main Line, with clearance over the Bryn Mawr and Wayne (R. 115a), though La Portes did not license pictures by master agreements. Fried's Suburban and Wayne had clearances over the Bryn Mawr commencing in 1937, though he did not license pictures by master agreements. Columbia had no master agreement with Warner until 1932 (R. 81a), yet it began licensing the Ardmore with clearance over the Bryn Mawr in 1930 (R. 82a-83a); while Paramount had a master agreement with Warner in 1931, yet at that time it licensed first-run Main Line to Bryn Mawr.

Furthermore, the courts have held that practices are not illegal per se merely because held improper in the **Paramount** case. **Fifth and Walnut, Inc. et al. v. Loew's Incorporated, et al.**, 176 F. 2d 587, 590 (CA, 2, 1949), cert. den. 338 U. S. 894; **Dipson Theatres, Inc. v. Buffalo Theatres, Inc.**, 190 F. 2d 951, 957, 958 (CA 2, 1951), cert. den. 343 U. S. 926 (1952).

F. There Was No Error in Refusal to Direct a Verdict for Petitioner.

Petitioner argues that the trial court should have directed a verdict for her as plaintiff.

The same argument was made in the **Theatres Enterprises** case and rejected by this Court, Mr. Justice Clark stating (p. 541):

> "* * * the *Paramount* decrees, even if admissible, were only prima facie evidence of a conspiracy covering the area and existing during the period there involved. **Alone or in conjunction with the other proof of the petitioner [plaintiff], they would form no basis for a directed verdict.** * * *"

In **Theatre Enterprises**, each distributor denied the existence of any collaboration and introduced evidence explaining the reasons for the decisions reached. This Court stated that such evidence raised "fact issues" requiring submission of the case to the jury. Each distributor did the same in the present case, and a similar conclusion must necessarily follow.

II. THE CONCLUSION THAT PETITIONER, IN THE CIRCUMSTANCES OF THIS CASE, HAD NO STANDING TO SUE, IS CORRECT.

The second major reason assigned by petitioner for the allowance of the writ of certiorari is the conclusion of the trial court that petitioner in the setting of this case had no standing to sue (p. 31).

As already stated petitioner was not the operator of the Bryn Mawr; she was the landlord. Her theatre was operated exclusively by her tenants, who negotiated for all runs and clearances. The petitioner never had any dealings with the distributors, made no demands for the runs which she now says were unavailable for her theatre, and never even made known to the distributors that she owned the theatre.

It is small wonder that Judge Kirkpatrick, in denying petitioner's motions for judgment n. o.v. or new trial, stated that petitioner was not entitled to maintain the action, since her loss if any was "beyond the limit of injuries cognizable under the antitrust laws" (R. 334a).

There is nothing in the decisions of the courts below regarding petitioner's lack of standing to sue which conflicts with either of the decisions of this Court cited by petitioner (**Chattanooga Foundry & Pipe Works v. City of Atlanta,** 203 U. S. 390 (1906); **Bigelow v. RKO Radio Pictures,** 327 U. S. 251 (1946)). On the contrary, these cases are themselves authority for the principle that recovery under the antitrust laws is available only to one who demonstrates a legal injury attributable directly, and not remotely, to an alleged violation of the statutes.

The last sentence in the quotation from the opinion in the **Chattanooga** case (set forth in the petition, p. 32, n. 28) demonstrates the availability of the remedy only to persons "directly affected" by the conduct in question.

Petitioner has cited in a footnote (p. 33) two district court cases which purportedly conflict with the rulings of the courts below. They are **East Orange Amusement Co. v. Vitagraph Inc. et al.,** CCH Trade Regulation Service (1941-43), ¶ 52,965 (D.N.J.), and **Camrel Co. Inc. v. Paramount Film Distributing Corp. et al.,** CCH Trade Cases (1944-45), ¶ 57,233 (S.D.N.Y.). In each case the district court merely refused to dismiss the complaint without trial. This procedural difference alone distinguishes the cases.

In addition, there are significant factual differences between those cases and the present case which were demonstrated to the courts below. In both of the cited cases the plaintiffs had pleaded that because of the conspiracy their lessees defaulted in their rent; and it was alleged that the **plaintiffs** had demanded and the defendants had **refused to give the plaintiffs** the runs required by their respective theatres. In the present case none of those facts existed.

Therefore, the decisions referred to by petitioner do not conflict with the conclusions of the lower courts that petitioner as a non-operating theatre owner did not in this trial establish her right to recover under the antitrust laws.

III. THE SCOPE OF SECTION 5 HAS BEEN AMPLY DEFINED.

In her final argument, petitioner contends that unless certiorari is granted in this case, private suitors will be deprived of the benefits of Section 5 of the Clayton Act.

This Court's decisions make eminently clear the availability of Section 5 to private suitors, and demonstrate the scope of its assistance. There is not the slightest inconsistency between those decisions and what was done in this case.

The petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 196.

F. E. HARRISON,
Petitioner,

v.

PARAMOUNT PICTURES, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

In petitioner's view, this case presents the following important issues vitally affecting the public interest which merit the consideration of this Court.[1]

1. The District Court and Court of Appeals for the Third Circuit[2] have ruled that in a private antitrust suit the jury may disregard an adjudication of conspiracy made by this Court in a prior equity suit by the United States against the same defendants, and may find lawful both the

1. Respondents' Brief strives to convey the impression that this case involves merely a dispute as to what is in the record and what the record and a number of cited cases mean. Petitioner has no desire to carry on such an argument here. Assuming (but by no means conceding) that respondents created factual issues requiring the submission of the case to the jury on the question of liability, the trial judge's instructions raise basic and significant questions which should be authoritatively resolved by this Court.

2. The opinion of the Court of Appeals (R. 680-81) is reported at 211 F. 2d 405.

conspiracy and means used to effectuate the conspiracy adjudicated unlawful in the antecedent suit.

In the present case petitioner invoked the benefits of Section 5 of the Clayton Act with respect to the decree in *United States v. Paramount Pictures, Inc.* Despite the determination by this Court that the conspiracy of the *Paramount* defendants unreasonably and illegally restrained trade and that various means used to effectuate the *Paramount* conspiracy such as master agreements were illegal, the trial judge charged in the present case that the jury should decide *de novo* whether the *Paramount* conspiracy and the master agreements were unlawful. The Warner circuit theatre, the Ardmore, favored by respondents over petitioner's theatre, was licensed under master agreements found illegal in *Paramount* and which refer to that theatre by name (Pl. Ex. 4, R. 341, 224-25; Pl. Ex. 16, R. 347, 224-25; Pl. Ex. 21, R. 349, 224-25; Pl. Ex. 22, R. 351, 224-25; Pl. Ex. 28, R. 379, 224-25; Pl. Ex. 32, R. 381, 224-25).

The trial judge charged *inter alia* as follows:

> There is no question that the Bryn Mawr Theatre ultimately reached a position, through the defendants' licensing—the licensing provisions imposed by the various defendants—where it was only able to get pictures after Ardmore had run the pictures; but we still have to deal with the question of reasonableness and that wasn't determined at all. The question of reasonable clearances in Bryn Mawr or on the Main Line, Philadelphia, was not determined at all by the Paramount case and so far as proving these clearances and runs that have been established to be reasonable or unreasonable, the burden there is on the plaintiff and you must ask yourselves whether those clearances were reasonable or unreasonable. (R. 272)

The trial judge charged *inter alia* as follows:

> Of course, if you determine that those clearances imposed generally were reasonable throughout the district there, if you determine they are reasonable, that would be the end of the case. You wouldn't have to go any further. If you find they are unreasonable, then you have to determine whether or not they are the result of an illegal conspiracy or combination * * * (R. 274).

The trial judge charged the jury *inter alia* that:

> * * * you can compare the contracts, you can determine the questions raised about the propriety or impropriety of so-called master contracts and what they were. * * * (R. 279)

The trial judge stated that his charge was premised upon his view that:

> * * * if clearances are reasonable—I don't think it makes any difference whether they were the result of a combination or whether they weren't, if they are reasonable. That is certainly what I told the jury and I can't go over it. I will allow an exception of course. (R. 281)

The trial judge in a colloquy with respondents' counsel emphasized that he had instructed the jury not to consider the *Paramount* decree at all with respect to the question of so-called reasonableness of clearances:

> Mr. Harrison: Now next, unless Your Honor has changed his mind from yesterday, I certainly did not get the clear impression today that the jury had been told that they were not to consider the Paramount decree in connection with the first interrogatory.

> The Court: Oh, yes I did. • • •
>
> • • •
>
> The Court: I said the burden of proof was on the plaintiff.
>
> Mr. Harrison: And then you shifted over to the United States vs. Paramount and what that did. What I am asking is that Your Honor say to the jury specifically that, in considering the first question, they are to pay no attention, to give no weight of any kind to the other case that you referred to.
>
> The Court: I think I made that perfectly clear. I don't know that I said it in those words but I said the burden of proof was on the plaintiff to establish the unreasonableness of the restraints and that is quite sufficient. (R. 289-90)

The position of the trial court is set forth in the court's opinion, 115 F. Supp. 312, 313-314, as follows:

> The Court was correct in charging that, if what the defendants did did not unreasonably restrain competition, the fact that they may have acted in concert would not establish a violation of the Act, and that, therefore, if the jury found that there had been no unreasonable restraint, the question relating to the existence of a combination among the defendants need not be answered. • • • (R. 326)

This ruling, approved by the Court of Appeals, presents a question not heretofore determined by this Court. In petitioner's view this ruling nullifies the benefits sought to be conferred by Congress upon private suitors and thereby devitalizes the remedy of the private suit as an ancillary force in the administration of the antitrust laws.

2. The District Court and the Court of Appeals ruled as a matter of law that the landlord-owner of a theatre has absolutely no standing as a private suitor under the Clayton Act. This important question of federal law also has never been considered by this Court.

3. The interpretation of Section 5 of the Clayton Act by the courts below frustrates the Congressional purpose to minimize the burdens of private suitors. First,—by substituting for a concrete reconstruction of the *Paramount* case with its comprehensive decree, conclusions and findings, a mere abstract reference to the *Paramount* litigation. Secondly,—by failing entirely to submit the issue of impact and by permitting the jury to ignore the *Paramount* conspiracy. Finally—by rejecting the *Paramount* decree itself as an appropriate exhibit for the jury.

Since *Emich Motors Corp. v. General Motors Corp.* was a private suit founded upon an antecedent Government judgment entered upon a bare verdict of guilty, the treatment to be accorded a prior equity decree in favor of the United States represents an important question of federal law which has not been but which should be settled by this Court.

The petition for certiorari should be granted.

Respectfully submitted,

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